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No. 96-320

In the Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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28 pp

QUESTIONS PRESENTED

1. Whether the practical effect of this FELA case is confined to the unique facts concerning the Snowmen of Grand Central Terminal, a handful of 141 railroad workers who, due to the Railroad's negligent violation of OSHA asbestos regulations in GCT during the late 1980s, now have a significant increased risk of death from cancer as a result of ingesting into their lungs massive amounts of carcinogenic asbestos fibers on a daily basis for three years, and whose prolonged massive asbestos exposure will never be experienced by any other employees so long as employers comply with OSHA's mandatory regulations for asbestos in the workplace.

2. Whether there is any conflict between the Third Circuit's 1985 decision in *Schweitzer*, which held that FELA claims for physical asbestos injuries are not dischargeable bankruptcy claims until they become physically manifest, and the Second Circuit's decision in this case, which applied this Court's 1994 *Gottshall* standard for FELA negligently inflicted emotional distress claims to the unique facts concerning the Snowmen of Grand Central Terminal's massive exposure to asbestos and resulting significant increased risk of death from cancer.

3. Whether the Second Circuit was correct in ruling that a railroad worker's negligently unprotected ingestion of massive amounts of carcinogenic asbestos fibers into his lungs on a daily basis for three years resulting in a significant increased risk of death from cancer constitutes a "physical impact" under this Court's *Gottshall* standard sufficient to support a FELA negligent infliction of emotional distress claim.

4. Whether the Second Circuit was correct in ruling that when a railroad worker suffers negligently inflicted emotional distress as a result of a physical impact with bodily harm, the resulting emotional distress need not be severe to be recoverable under the FELA.

5. Whether the Second Circuit was correct in ruling that given their significant increased risk of developing asbestos-related disease as a result of their ingestion of massive amounts of asbestos fibers into their lungs on a daily basis over three years, the Snowmen of Grand Central Terminal can recover damages for the cost of future medical monitoring to ensure the early detection and treatment of any asbestos-related disease they develop.

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STATEMENT OF THE CASE

This case concerns one of the Snowmen of Grand Central Terminal, a handful of 141 railroad workers who were exposed to massive amounts of asbestos fibers while working in the miles of steam tunnels beneath Grand Central Terminal during the late 1980s. They were called Snowmen because every day after working on the old pipe insulation in the tunnels, they would emerge covered from head to toe with white pipe insulation dust [App. 11a; "App." refers to the Appendix in the Petition]. Despite the fact the Railroad knew the insulation was asbestos, for years the Railroad ordered the Snowmen to physically handle and remove the insulation without telling them it was asbestos and without providing them with any protection from the asbestos, in gross violation of OSHA's mandatory regulations for asbestos in the workplace. The Railroad now admits that it knowingly and negligently exposed the Snowmen to the carcinogenic asbestos fibers without warning or protecting them.

The plaintiff respondent Michael Buckley is one of the Snowmen. A pipefitter employed by the defendant Metro-North Commuter Railroad, he is a married 42-year-old father of two with a 10th grade education [JA 447-50; "JA" refers to the Joint Appendix filed with the Second Circuit]. For three years from 1985 to 1988 he was exposed to massive amounts of carcinogenic asbestos fibers on a daily basis, and as a result he now has a significantly increased risk of dying from cancer.

There are only 140 other Snowmen, and the nature of their asbestos exposure is now unique: although such prolonged unprotected exposure occurred prior to 1970, by the late 1980s there were laws and OSHA regulations in place that prevented employers from exposing unprotected workers

to asbestos [JA 252-54]. And indeed, since the OSHA asbestos regulations went into effect in the mid-1970s, there has been no other reported group of workers with the prolonged massive amount of exposure suffered by the Snowmen [JA 254].[1] This action was brought to address the Snowmen's unique situation by providing them with appropriate medical monitoring and an opportunity to obtain just compensation for the Railroad's negligent infliction of emotional distress.

Asbestos fibers are microscopic, needle sharp, and virtually indestructible. When a person inhales air containing asbestos fibers, the fibers form into a longitudinal arrangement parallel with the direction of the wind stream and pass directly into the lungs [JA 113-14]. The fibers are swept into the lungs' tubes and parenchyma, where they impale the tissue and become permanently embedded [JA 140]. The fibers provoke irritation and initiate harmful biological changes in the lung tissue [JA 684-89]. Those changes include the activation of macrophages which attempt to detoxify the embedded asbestos fibers [JA 153-55]. While attempting to engulf the asbestos fibers the macrophages die and release enzymes that further damage the lung tissue [JA 246-51]. Among other things, this process impairs the lungs' ability to clean themselves. Accumulated asbestos fibers also can be carried from the lungs to other parts of the body through the bloodstream or lymphatic system [JA 140].

Asbestos is a known carcinogen that is active in many sites in the human body. It causes mesothelioma (a cancer of the lining of the lungs), lung cancer, and colon cancer, as well as scarring of the lungs [JA 280-81]. Many of these

[1] The Snowmen's exposure is equivalent to the asbestos exposure of shipyard workers during the years of World War II [JA 252-53].

conditions can be beneficially treated if detected early enough through medical monitoring [JA 136; 688-89].

Asbestos-related diseases can bc entirely prevented by controlling the release of asbestos in the workplace or by providing workers with proper protective equipment. Employers who comply with OSHA's workplace asbestos regulations do not expose their employees to any significant amount of asbestos fibers [JA 143; 287; 251; 689].

The Record established that Buckley inhaled massive amounts of asbestos fibers into his lungs on a daily basis over three years [JA 294-97; 305-06; 460-65]. His lung tissue was impaled by the sharp asbestos fibers, damaging the tissue and the ability of his lungs to clean themselves [JA 153-55]. The asbestos fibers also physically contacted his hair, ears, nose, and mouth as well as the skin of his face and hands [JA 460-61].

The expert who testified regarding the degree of Buckley's increased risk, Dr. William J. Nicholson, is the risk assessor the United States Environmental Protection Agency relied on for its asbestos standards, and he also did the risk assessment for OSHA on which OSHA's occupational asbestos exposure standards are based [JA 273; 276-77]. He established that on a daily basis from 1985 to 1988 Buckley was exposed to enormously high concentrations of asbestos fibers "far in excess" of OSHA's Permissible Exposure Limit [JA 304].

In the field of risk assessment, a .001% increased risk of dying is a "highly significant" increased risk that should be eliminated where possible [JA 297-98]. OSHA considers an increased risk of death from asbestos exposure in the workplace of even 1% to be "substantial" and an increased risk of death of 5% to be "totally unacceptable." [JA 276-77]. As a

result of his asbestos exposure, Buckley now has an increased risk of dying from asbestos-related cancer of between 1% to 5%, ranging from "substantial" to "totally unacceptable" and 10 to 50 times greater than "highly significant." [JA 300-02]. As a result of his exposure, his total risk of dying from cancer now has increased by up to 25% [JA 348-49], and his risk of developing pleural scarring and fibrosis has increased by 10% [JA 162; 302-03].

Buckley has a reasonable scientific basis to fear that he will develop a fatal asbestos-related cancer, and that basis will continue for the rest of his life [JA 310-11]. Clinical evidence of asbestos disease does not begin to appear until at least 10 years after the first exposure [JA 263-64]. It is now 10 years since Buckley's first exposure, and his asbestos medical expert recommends that Buckley begin medical monitoring on an annual basis for the rest of his life [JA 167-68; 234-35; 244-46]. Many asbestos diseases can be beneficially treated if detected early enough, and the purpose of the medical monitoring is to detect and treat any asbestos disease as early as possible [JA 230-31; 245-46; 263-64]. The annualized cost of the medical monitoring examinations and tests is $950 [JA 168-70].

Buckley is aware that he has ingested a massive amount of carcinogenic asbestos fibers into his lungs resulting in a significant increased risk of dying from asbestos-related cancer [JA 204; 398]. He is aware that his increased risk will continue for the remainder of his life. He is aware that there is no way to remove the asbestos fibers he has ingested and no way to undo the harmful biological process set in motion by those fibers [JA 487; 513-14]. He is aware that no amount of medication or psychiatric treatment will change this reality [JA 513-14]. In effect, the Railroad has placed a ticking time bomb in his chest which may never go off but which he has to live with for the rest of his life.

Buckley has and will continue to experience for the rest of his life an appropriate level of distress in the form of anger over what the Railroad has done to him and fear of the harmful changes in his body resulting from his massive asbestos exposure. His treating asbestos medical expert, Dr. Stephen Markowitz, confirmed that Buckley has an appropriate degree of fear and concern regarding the long-term effects of his asbestos exposure [JA 266a] . Buckley's anger over what the Railroad has done to him was corroborated by the testimony of his co-workers and by his complaints to his supervisors and to the offices of the MTA Inspector General and the New York Attorney General (which issued a Joint Report confirming the Snowmen's asbestos exposure resulted from Metro-North's violation of OSHA's asbestos regulations) [JA 487-91; 740-50].

REASONS FOR DENYING THE WRIT

Contrary to the Railroad's characterization, this is not a case of "mere exposure" to asbestos that will unleash a "flood of trivial suits" if left undisturbed.[2] The Second Circuit did not hold that "mere exposure" to asbestos is sufficient to recover under the FELA. Rather, the Circuit Court carefully applied this Court's *Gottshall* test to the unique facts of this FELA case and held that Buckley's "massive, lengthy, and tangible" exposure to asbestos fibers resulting in a significant increased risk of death from cancer constitutes a sufficient "physical impact" under *Gottshall* to

[2] Apparently the various amicus curiae are laboring under the misapprehension that this is a case of "mere" or "trivial" exposure to asbestos of the kind experienced by millions of people. The facts in the Record prove otherwise. Indeed, after closely reviewing the Record, the Second Circuit stressed that "Buckley and the other 'snowmen' present what we believe is an unusual case, as Buckley's exposure to asbestos was massive, lengthy, and tangible." [App. 23a].

support a FELA negligent infliction of emotional distress claim [App. 22a-23a].

The Snowmen of Grand Central Terminal's massive prolonged asbestos exposure was a singular aberration, and will never be experienced by any other workers on or off the railroads so long as employers comply with OSHA's mandatory regulations for controlling asbestos in the workplace. This "unusual case" [App. 23a] can have no practical effect beyond the narrow category of the FELA, and even within the FELA it will not expand liability as long as railroads fulfill their legal duty to comply with OSHA's mandatory asbestos regulations.

There is no conflict with the Third Circuit's decision in *Schweitzer*, which preceded this Court's landmark *Gottshall* decision by nine years and which was not even a FELA negligent infliction of emotional distress case. And damages for the costs of future medical monitoring are appropriate given Metro-North's negligent, massive exposure of Buckley to a known carcinogen resulting in his significant increased risk of developing asbestos-related disease.

Metro-North's incantation of a parade of horribles is nothing more than an attempt to divert this Court's attention away from the unique magnitude of the wrong it committed against the 141 Snowmen of Grand Central Terminal, a wrong that will never be repeated as long as employers abide by OSHA's asbestos regulations but which Michael Buckley will have to live with for the rest of his life.

I. THE PRACTICAL EFFECT OF THIS FELA CASE IS CONFINED TO THE UNIQUE FACTS CONCERNING THE SNOWMEN OF GRAND CENTRAL TERMINAL

Metro-North makes the unsupported claim that this case will open the courtroom door to "tens of thousands" of plaintiffs with "extraordinary economic consequences" upon "government and non-government" entities "under other federal statutes and the common law." [Petition at pgs. 6, 12]. This argument has no foundation in reality, and is based on two false premises: that this FELA case constitutes binding precedent on all non-FELA state and federal tort cases; and that the type of massive daily exposure to enormous amounts of asbestos fibers over a three year period resulting in a significant increased risk of death from cancer suffered by the Snowmen of Grand Central Terminal is a common everyday occurrence throughout the nation.

The FELA only applies to a narrow class of railroad workers who are negligently injured on the job. It does not apply to non-railroad workers or to the public at large. *Gottshall* at 2412, 2418. The number of railroad workers who can bring a negligent infliction of emotional distress claim under the FELA is further limited by the test set forth by this Court in *Gottshall*. And a FELA case simply does not apply to or have any precedential effect on state common law cases or on non-FELA federal statutory cases.

The facts of this case are unique, and will never recur as long as employers comply with OSHA's mandatory regulations for controlling asbestos in the workplace. Indeed, neither Metro-North nor Buckley has found a parallel fact situation in any reported cases, state or federal. This is not surprising given that Metro-North's gross violation of OSHA's asbestos regulations at Grand Central Terminal

during the late 1980s was an aberrant episode that even Metro-North has not repeated. The asbestos medical expert confirmed the medical literature does not contain any reports of such massive prolonged exposure occurring since OSHA's asbestos regulations went into effect in the early 1970s. It is not surprising there is a lack of similar fact situations because OSHA's asbestos regulations are designed to eliminate any such exposure and employers are legally obligated to comply with OSHA's regulations.

Where then, will these "tens of thousands" of plaintiffs suing "government and non-government" entities come from? Non-railroad workers are covered by workmen's compensation statutes and are legally barred from suing their employer. Members of the public simply do not have the type of massive direct exposure to asbestos on a daily basis for years at a time that is required to develop a significant increased risk of death from asbestos-related cancer. This FELA case does not even apply to railroad workers unless they have that type of massive prolonged exposure. And employers routinely comply with OSHA's asbestos regulations, completely eliminating any unprotected exposure to asbestos fibers, much less the type of massive prolonged exposure suffered by the Snowmen here.

Any railroad that fulfills its legal duty to comply with OSHA's asbestos regulations has nothing to fear from this case. Conversely, any railroad that grossly violates OSHA's asbestos regulations by subjecting its workers to the type of massive prolonged exposure suffered by the Snowmen of Grand Central Terminal must face the consequences of such egregiously negligent conduct, and deservedly so. Such aberrant behavior has never recurred anywhere else, however. If the importance of a case depends on how many other persons apart from the litigants will be affected, then this case is of no importance at all.

There is no injustice here, for the Second Circuit simply applied *Gottshall* to provide an appropriate remedy for the handful of Metro-North employees who had the singular misfortune of being massively exposed to carcinogenic asbestos fibers on a daily basis over a three year period in gross violation of OSHA's asbestos regulations and who as a result now must live with a significant increased risk of dying from asbestos-related cancer. There can and will be no "flood of litigation" generated by this unusual case.

II. THERE IS NO CONFLICT BETWEEN THIS CASE AND THE THIRD CIRCUIT'S 1985 DECISION IN *SCHWEITZER*

Schweitzer was a pre-*Gottshall* bankruptcy case that did not concern a FELA claim for negligently inflicted emotional distress. The issue decided by *Schweitzer* was "whether plaintiffs, who allege that they were exposed to asbestos prior to their employer's [Bankruptcy Act] reorganization and did not manifest any injury until after the relevant consummation dates, had 'claims' that were discharged in the reorganization proceedings." *Schweitzer* at 941. *Schweitzer* merely followed the obvious rule that a FELA claim for a physically manifested physical injury does not accrue until the physical manifestation occurs. By contrast, this case concerns a post-*Gottshall* FELA negligent infliction of emotional distress claim, which by definition does not involve or require a physically manifested injury. There is no conflict because *Buckley* and *Schweitzer* address two entirely different claims.

Metro-North confuses post-*Gottshall* FELA claims for the negligent infliction of emotional distress (which do not require any manifest physical injury) with more typical FELA claims based on a physically manifested injury. There is a sharp difference between the two types of claims. The classic

FELA claim is for a physical injury that is physically manifest, and naturally such a claim does not accrue until the physical injury becomes physically manifested (the same holds true for occupational disease physical injury claims).

But a post-*Gottshall* FELA claim for the negligent infliction of emotional distress is quite different. It does not require any physical injury at all. In fact, that is what differentiates a FELA claim for negligently inflicted emotional distress: it is a cause of action for emotional distress that accrues even though there is no manifest physical injury ("The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms." *Gottshall* at 2405 [emphasis added]).

The legal issue confronting the Second Circuit in this case was radically different from the bankruptcy issue confronting the Third Circuit in *Schweitzer*. There, the Third Circuit's task was to decide whether non-manifested physical injury claims were dischargeable under the Bankruptcy Act. *Schweitzer* did not address or decide anything regarding a FELA claim for the negligent infliction of emotional distress. Indeed, it was not until nine years later that the standard applicable to such purely emotional distress FELA claims was set forth by this Court's 1994 landmark *Gottshall* decision.

Here, the Second Circuit's task was to apply *Gottshall*'s FELA negligent infliction of emotional distress standard to the unique set of facts concerning the Snowmen of Grand Central Terminal and their massive negligent exposure to asbestos over a three year period resulting in a significant increased risk of death. *Schweitzer* was a case concerning FELA claims for manifest physical injuries, decided at a time

when *Gottshall* did not even exist. *Buckley* is a FELA negligent infliction of emotional distress case controlled by *Gottshall*. There is and can be no conflict between the two.

III. THE SECOND CIRCUIT CORRECTLY APPLIED *GOTTSHALL*'S PHYSICAL IMPACT TEST

In *Gottshall*, this Court for the first time declared the standard to apply to FELA negligent infliction of emotional distress claims: "the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Gottshall* at 2406 [emphasis added]. By definition, a negligent infliction of emotional distress claim does not require or involve a manifest physical injury. The focus is on "physical impact" or "risk of physical harm," not on physical injury.

As this Court noted in *Gottshall*, the zone of danger test is less restrictive than the common law physical impact test because it embraces claims based on threatened physical impact as well as on actual physical impact. *Gottshall* at 2410-11. The physical impact test, in other words, is subsumed within the broader zone of danger test. ("The physical impact test, of course, would achieve many of the same ends as the zone of danger test. We see no reason, however, to allow an employer to escape liability for emotional injury caused by the apprehension of physical impact simply because of the fortuity that the impact did not occur." *Gottshall* at 2411). Metro-North's mistaken reading of the phrase "those within the zone of danger of physical impact," *Gottshall* at 2406, as excluding workers who sustain a physical impact violates common sense: a railroad worker

who actually sustains the physical impact is by definition within the zone of danger of the physical impact.[3]

An application of *Gottshall*'s physical impact test to the facts of this case reveals the following. Metro-North admits that for years it knowingly and negligently exposed the respondent Michael Buckley to carcinogenic asbestos fibers without warning, training, or protecting him. Buckley's body sustained a physical impact from the asbestos fibers, and in particular the needle-like fibers have become embedded in the tissue of his lungs, causing bodily harm and initiating a harmful biological process that cannot be reversed. As a result of that physical impact, Buckley now has a significantly increased risk of dying from asbestos-related cancer. Clearly, Buckley has been physically impacted by the asbestos fibers and now is able to recover for emotional distress caused by his anger over what was done to him and his fear of developing asbestos-related disease and death.

Metro-North simply ignores the fact that this is a FELA negligent infliction of emotional distress case controlled by *Gottshall*'s physical impact standard. Instead, Metro-North pretends this is a run-of-the-mill occupational disease case which requires a physically manifest occupational disease injury in order to be recoverable. But Buckley is not seeking any FELA damages for a physically manifest occupational disease. He merely is seeking recovery under the FELA for negligently inflicted emotional distress resulting from his

[3] Contrary to Metro-North's argument, the law review article quoted by this Court in *Gottshall* did not exclude plaintiffs who sustain a physical impact from the "zone of danger of physical impact" rule. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 488-90 (1982).

massive physical impact with asbestos, a known carcinogen, that has significantly increased his risk of dying from cancer.[4]

Moreover, Metro-North completely ignores the leading post-*Gottshall* case relied on by the Second Circuit: *Marchica v. Long Island Railroad Co.*, 31 F.3d 1197 (2nd Cir. 1994), *cert. denied*, 115 S.Ct. 727 (1995). *Marchica* also applied *Gottshall*'s physical impact test to an unusual set of facts, and allowed a railroad worker to recover under the FELA for negligent infliction of emotional distress when his hand was pricked by a discarded hypodermic needle under circumstances that would cause a reasonable person to develop a fear of AIDS. In *Marchica*, the Second Circuit thoroughly surveyed the common law concerning emotional distress for fear of developing a future disease in the light of *Gottshall*'s FELA physical impact test, and properly adopted the view most consistent with the FELA's remedial nature: "Thus, a FELA plaintiff who has suffered a physical impact may recover for a fear of developing AIDS if the impact caused by the defendant's negligence occurred under circumstances that would cause a reasonable person to develop a fear of AIDS." *Marchica* at 1206.

[4] Although Metro-North refers in passing to "claim-splitting" [Petition at pgs. 10-11], Metro-North's failure to raise or address that issue at the trial court or court of appeals levels eliminates it as an issue before this Court ("this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n. 5 (1980)). Nevertheless, the cases relied on by Metro-North -- *Mellon v. Goodyear*, 277 U.S. 335, 344 (1928), and *Flynn v. New York, N.H. & H. R. Co.*, 283 U.S. 53, 56 (1931) -- concerned the right of widows to bring a belated FELA death claim long after the settlement of the underlying FELA physical injury claim, and are inapposite here. A FELA claim for the negligent infliction of emotional distress is separate and distinct from a FELA manifest physical injury claim.

As it did in *Marchica*, the Second Circuit in *Buckley* applied *Gottshall*'s physical impact standard to the unusual facts concerning the Snowmen's massive prolonged daily ingestion of the needle-like carcinogenic asbestos fibers, and properly held that "a jury, presented with the evidence in this case, may find that Buckley suffered an impact that would cause fear in a reasonable person." [App. 23a]. Given the extraordinary circumstances surrounding the Snowmen's massive asbestos exposure, there is nothing erroneous or radical about such a holding. If anything, *Buckley* and *Marchica* merely demonstrate the ongoing ability of this Court's *Gottshall* test to justly resolve a wide variety of unusual fact situations.

IV. THE SECOND CIRCUIT CORRECTLY RULED THAT FELA NEGLIGENTLY INFLICTED EMOTIONAL DISTRESS NEED NOT BE SEVERE WHEN IT RESULTS FROM A PHYSICAL IMPACT WITH BODILY HARM

After reviewing the common law and *Restatement (Second) of Torts*, the Second Circuit found that "emotional distress must be 'severe' only when a plaintiff has not suffered a physical impact." [App. 24a].[5] It is only where

[5] This is fully consistent with the common law physical impact standard extant since the time the FELA was enacted and incorporated into this Court's *Gottshall* standard. See, for example: *Porter v. Delaware, Lackawanna Western Railroad Co.*, 73 N.J.L. 405, 63 A. 860 (1906) (dust in the eyes sufficient physical impact to allow recovery for fright); *Morton v. Stack*, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke during apartment fire sufficient physical impact to allow recovery for nervousness and trouble sleeping for several weeks thereafter); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 433-34 (Tenn. 1982) (where defendant negligently permitted carcinogenic chlordane to infiltrate family's household water supply, family members' consumption of water containing chlordane in excess of State Department of Water Quality Control safe limits constitutes sufficient physical impact to allow recovery for anxiety that did not physically manifest itself and was not so severe as to require medical treatment); *Lavelle v. Owens-Corning Fiberglas Corp.*, 30 Ohio Misc. 2d 11, 507 N.E. 2d 476, 480-81 (Ohio 1987) (prolonged extensive physical contact with asbestos fibers resulting in increased statistical likelihood of developing asbestos-related cancer sufficient physical impact to allow recovery for increased fear of cancer).

there is no physical impact that the severity of the emotional distress must serve to guarantee the genuineness of the claim. Since Buckley has suffered a physical impact here, he is "entitled to all damages flowing from the impact, including his reasonable emotional distress." [App. 24a]

Metro-North, however, argues that to be recoverable, emotional distress must be so severe as to manifest itself physically ("severe emotional distress is accompanied or followed by shock, illness, or other bodily harm." *Restatement* at Section 46 Comment k). However, Metro-North ignores this Court's own definition of negligently inflicted emotional distress, which specifically states that manifest physical symptoms are not necessary: "The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms." *Gottshall* at 2405 [emphasis added]. Clearly, it is not a prerequisite that FELA negligently inflicted emotional distress be so severe as to manifest itself physically.

Metro-North also ignores another crucial fact controlling this case: Michael Buckley not only has suffered a massive physical impact from the asbestos fibers, he also has suffered and will continue to suffer "bodily harm" in the form of harm to his lung tissue that has set in motion an irreversible harmful biological process. As the *Restatement* confirms, the presence of such "bodily harm" from physical impact entitles

Buckley to recover for his emotional distress with or without a showing of "severe" emotional distress.

It is a basic principle of tort law that when a plaintiff has suffered some "bodily harm" as a result of a defendant's negligent conduct, the plaintiff "is entitled to recover damages for past or prospective bodily harm and emotional distress [and] ... reasonable medical and other expenses." *Restatement* at Section 924. The *Restatement* defines "bodily harm" as "any physical impairment of the condition of another's body." *Restatement* at Section 15. "Impairment" is defined accordingly: "There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." *Restatement* at Section 15 Comment a.

The record here establishes that Michael Buckley has suffered "bodily harm" as a result of Metro-North's negligent conduct in exposing him to massive amounts of asbestos fibers on a daily basis over a period of three years. That exposure has caused him to ingest massive amounts of carcinogenic asbestos fibers into his lungs, where they have become impaled and embedded in his lung tissue, altering the structure of the tissue and setting in motion an irreversibly harmful biological process. That is "bodily harm" within the meaning of the *Restatement*.

The Second Circuit correctly read Section 436A of the *Restatement* as not being applicable to the facts of this case. Section 436A is entitled "Negligence Resulting in Emotional Disturbance Alone," and states: "If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for

such emotional disturbance." [emphasis added]. Section 436A only applies to situations where there is no bodily harm caused by the negligent conduct. That is, it only applies to instances where the negligent conduct does not cause initial bodily harm, but rather only causes emotional disturbance which itself does not generate any bodily harm. Where, as here, the defendant's negligent conduct does produce "bodily harm," the defendant is liable for any emotional disturbance flowing from the negligent conduct even if the emotional disturbance itself does not produce any additional bodily harm (i.e., even if the emotional distress is not "severe").

This is demonstrated by Section 436A's Illustration, which concerns a plaintiff who while eating negligently manufactured cottage cheese finds her mouth full of glass. The entire example is predicated on the fact that the plaintiff "is not cut or otherwise physically injured, and she succeeds in removing the glass without bodily harm." By contrast, if she had suffered some bodily harm from the glass, she then would be entitled to recover for whatever emotional disturbance flows from the negligent conduct, even if the emotional disturbance is not severe, physically manifest, or medically verified.

The fallacy in Metro-North's argument is its failure to acknowledge the fact established in the Record that Buckley has indeed suffered a "bodily harm" that entitles him to recover for whatever emotional disturbances flow from Metro-North's negligent conduct. The Second Circuit was correct in ruling that Buckley, who suffered a negligent physical impact causing bodily harm, does not have to show "severe" emotional distress in order to recover for the emotional disturbances flowing from Metro-North's negligent conduct. This is entirely consistent with *Gottshall*'s physical impact rule and the common law of torts as distilled by the *Restatement (Second) of Torts*.

Metro-North misreads the pre-*Gottshall* *Amendola v. Kansas City Southern Ry. Co.*, 699 F.Supp. 1401 (W.D. Mo. 1988), case as requiring "physical injury" rather than merely some "physical harm." *Amendola* held that "a plaintiff seeking recovery under the FELA for the negligent infliction of emotional distress must introduce evidence that he or she has suffered physical harm as a result of the conduct which caused the emotional distress." *Amendola* at 1410. The *Amendola* court carefully distinguished between "physical injury" and "physical harm," holding that in order to recover for negligently inflicted emotional distress, "physical injury" was not required, only some "physical harm." *Amendola* at 1410-11. Thus *Amendola*'s "physical harm" is synonymous with the *Restatement*'s "bodily harm." There is no conflict between *Amendola* and *Buckley* because the Record here establishes that as a result of Metro-North's negligent conduct Buckley has suffered "bodily or physical harm" within the meaning of both the *Restatement* and *Amendola*.[6]

Metro-North's argument that Buckley's emotional distress is "temporary," "evanescent," and "trivial" [Petition at p. 23] is contradicted by the Record. Although it is uniquely peculiar to Buckley's unusually massive asbestos exposure, the emotional distress stemming from his life-long wait to see if the enormous amount of carcinogenic asbestos fibers he has ingested will blossom into a fatal cancer is not temporary or evanescent or trivial. In effect, Metro-North has placed a ticking time bomb in Buckley's chest, and his understandable

[6] Metro-North's reliance on *Williams v. Carnival Cruise Lines, Inc.*, 907 F.Supp. 403 (S.D. Fla. 1995), is misplaced. *Williams* was a non-FELA and non-Jones Act case decided by a Magistrate Judge. Because there was no physical impact involved and no bodily harm proved, the Magistrate Judge applied Section 436A of the *Restatement* (which only applies to non-physical impact cases). Here, by contrast, there is proof of physical impact and "bodily harm," and Section 436A is inapplicable.

anger, fear, and distress over when and if that time bomb will explode will continue for the rest of his life. Buckley knows there is nothing he can do to remove those carcinogenic fibers from his lungs or to reverse the harmful biological process they have set in motion. All he can do is to wait for a cancer to surface clinically and hope that medical monitoring will detect it early enough to maximize his prognosis. His resulting anger and fear, however, have become an understandably permanent part of his life.

The Second Circuit did require objective evidence of Buckley's emotional distress, and found it in the Record [App. 23a-25a]. Buckley's treating asbestos medical expert confirmed that Buckley exhibited an appropriate degree of anger and concern over his massive exposure and significantly increased risk of death by cancer. The amount of objective evidence was "slim" only because the trial court improperly limited Buckley from introducing evidence establishing the full basis and context of his emotional distress [Plaintiff's Second Circuit Brief at pgs. 25-27], and the retrial will allow a fuller record to be developed.

The Second Circuit was careful to note that speculative or frivolous claims will be avoided by application of the test used in *Marchica*, namely whether the impact would cause fear in a reasonable person: "To make this determination, a jury must take into account the nature of the toxic substance, its method of transmission into the body, the extent of the exposure to the substance and how the disease develops in response to the presence of the toxic substance in the body." [App. 21a]

This standard is not, as Metro-North argues, "inherently imprecise and unworkable." [Petition at p. 10]. For example, OSHA's asbestos regulations contain a Permissible Exposure Limit for asbestos fibers beyond which workers cannot safely

be exposed. Where, as here, the Record establishes that a railroad worker has been exposed to carcinogenic asbestos fibers "far in excess" of OSHA's Permissible Exposure Limit every day for three years, there is a sufficient objective basis for a reasonable person to fear developing asbestos disease. By contrast, exposure below OSHA's Permissible Exposure Limit would not cause a significant increased risk and not provide a basis for fear in a reasonable person.

The reasonable person test applied by the Second Circuit in *Marchica* and *Buckley* allows the unique nature of asbestos exposure and disease to be taken into account while screening out any speculative or frivolous claims based on "mere" or "trivial" exposure to asbestos without significant increased risk. Here, the Second Circuit reviewed the Record and properly found that "Given the evidence of Buckley's prolonged and pronounced exposure to asbestos, a jury may find that he suffered an impact that would cause fear in a reasonable person." [App. 21a].

V. THE SECOND CIRCUIT CORRECTLY RULED THAT MEDICAL MONITORING COSTS ARE AN APPROPRIATE ELEMENT OF DAMAGES IN THIS CASE

As the Second Circuit noted, the recovery of reasonable medical expenses flowing from a defendant's negligent conduct has always been an element of common law and FELA tort law. The *Restatement (Second) of Torts* confirms that a tort plaintiff who has suffered negligently inflicted "bodily harm" is "entitled to recover damages for past or prospective ... reasonable medical and other expenses." *Restatement (Second) of Torts* at Section 924.

For a medical monitoring claim, the "injury" is the fact the plaintiff suffered a significant negligent exposure to a

proven toxic substance, resulting in a significant increased risk of contracting a serious latent disease that makes periodic diagnostic medical examinations and testing reasonably necessary and beneficial. *In Re Paoli R.R. PCB Litigation*, 916 F.2d 829, 852 (3d Cir. 1990), *cert. denied*, 499 U.S. 961, 111 S.Ct. 1584 (1991) [*Paoli* I], 35 F.3d 717, 787 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 1253 (1995) [*Paoli* II]. Because it is a plaintiff's significant exposure to a proven hazardous substance that justifies the need for medical monitoring, proof of a present or future physical injury is not a prerequisite for a medical monitoring claim.

Metro-North ignores the fact that this Court twice has declined to alter the standard for medical monitoring claims set forth in the *Paoli* cases. Indeed, Metro-North fails to address or even cite the *Paoli* cases, the leading precedent in the field, or the various common law cases upholding medical monitoring claims cited and discussed by the Second Circuit. [App. 26a-27a]. The Circuit Court in *Paoli* was not concerned about provoking a flood of medical monitoring claims because only claims based on significant exposure with significant increased risk are allowed and because the cost of medical monitoring is not high. *Paoli* II at 788.

Here, the respondent Michael Buckley satisfies each of the elements for a medical monitoring claim. Metro-North admitted that it negligently exposed Buckley to asbestos, a known carcinogen, for many years. The medical experts established that Buckley was exposed to a massive amount of asbestos on a daily basis for several years and as a result has a significant increased risk of developing asbestos-related diseases. The experts also confirmed that those diseases can be treated beneficially if caught early enough through periodic medical testing and examinations. The annualized cost of such medical monitoring for Buckley is $950.

There is no question that Buckley has suffered bodily harm from his negligent ingestion of massive amounts of carcinogenic asbestos fibers. The needle-like fibers have embedded themselves in his lung tissue, damaging the tissue and initiating a harmful biological process that is irreversible. Such toxic exposure with bodily harm producing significant increased risk of disease is a sufficient basis for recovery of medical monitoring costs. Indeed, the whole point of medical monitoring is to provide an early warning of illness that may develop as a result of significant toxic exposure, and thus a current diagnosed disease or physical injury is not required.

Michael Buckley is precisely the type of plaintiff who can benefit from medical monitoring: he has had a significant exposure to asbestos with a significant increased risk of developing asbestos-related diseases, but he has not yet developed a clinically diagnosed asbestos disease and can benefit from the early detection and treatment of any such disease. The Second Circuit was correct in ruling there is a reasonable basis for a medical monitoring claim in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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